

H. R. 4745

IN THE HOUSE OF REPRESENTATIVES

Mr. RODINO introduced the following bill; which was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

A BILL

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the “Classified Information
4 Procedures Act”.

5 DEFINITIONS

6 SEC. 2. (a) "Classified information", as used in this Act,
7 means any information or material that has been determined
8 by the United States Government pursuant to an Executive
9 order, statute, or regulation, to require protection against un-

1 authorized disclosure for reasons of national security and any
2 restricted data, as defined in section 2014(y) of title 42,
3 United States Code.

4 (b) "National security", as used in this Act, means the
5 national defense and foreign relations of the United States.

6 PRETRIAL CONFERENCE

7 SEC. 3. At any time after the filing of the indictment or
8 information, any party may move for a pretrial conference to
9 consider matters relating to classified information that may
10 arise in connection with the prosecution. Following such
11 motion, or on its own motion, the court shall promptly hold a
12 pretrial conference to establish the timing of requests for dis-
13 covery, the provision of notice required by section 5 of this
14 Act, and the initiation of the procedure established by section
15 6 of this Act. In addition, at the pretrial conference the court
16 may consider any other matters which relate to classified in-
17 formation or which may promote a fair and expeditious pros-
18 ecution.

19 DISCLOSURE OF CLASSIFIED INFORMATION TO
20 DEFENDANTS

21 SEC. 4. (a) If the Government discloses classified infor-
22 mation to a defendant in a criminal case whether in response
23 to a discovery request, in fulfillment of its due process obliga-
24 tions, or otherwise, the court, at the request of the Govern-
25 ment, shall enter an appropriate protective order to guard

1 against the compromise of the information disclosed to the
2 defendant. The terms of any such protective order may in-
3 clude, but need not be limited to, provisions—

4 (i) prohibiting the disclosure of the information
5 except as authorized by the court;

6 (ii) requiring storage of material in a manner ap-
7 propriate for the level of classification assigned to the
8 documents to be disclosed;

9 (iii) requiring controlled access to the material
10 during normal business hours and at other times upon
11 reasonable notice;

12 (iv) requiring appropriate security clearances for
13 persons having a need to examine the information in
14 connection with the preparation of the defense;

15 (v) requiring the maintenance of logs recording
16 access by all persons authorized by the court to have
17 access to the classified information in connection with
18 the preparation of the defense;

19 (vi) regulating the making and handling of notes
20 taken from material containing classified information;
21 and

22 (vii) authorizing the assignment of Government
23 security personnel and the provision of Government
24 storage facilities.

1 (b)(1) The court, upon motion of the Government, shall
2 authorize (i) the deletion of specified items of classified infor-
3 mation from documents to be made available to the defend-
4 ant, (ii) the substitution of a portion or summary of the infor-
5 mation for such classified documents, or (iii) the substitution
6 of a statement admitting relevant facts that the classified in-
7 formation would tend to prove, unless the court determines
8 that disclosure of the classified information itself is necessary
9 to enable the defendant to prepare for trial. The Govern-
10 ment's motion and any materials submitted in support thereof
11 shall, upon request of the Government, be considered by the
12 court in camera and shall not be disclosed to the defendant.

13 (2) If, pursuant to this procedure, any information is
14 withheld from the defendant and the defendant objects to
15 such withholding, and the trial is continued to an adjudication
16 of guilt of the defendant, the entire unaltered text of the rele-
17 vant documents as well as the Government's motion and any
18 materials submitted in support thereof shall be preserved by
19 the United States and, in the event the defendant appeals,
20 shall be made available to the appellate court for its examina-
21 tion in camera for the purpose of reviewing the determination
22 of the trial judge.

1 NOTICE OF DEFENDANT'S INTENTION TO DISCLOSE

2 CLASSIFIED INFORMATION

3 SEC. 5. (a) NOTICE BY DEFENDANT.—If a defendant
4 reasonably expects to disclose or to cause the disclosure of
5 classified information in any manner in connection with any
6 trial or pretrial proceeding involving the criminal prosecution
7 of such defendant, the defendant shall, within the time speci-
8 fied by the court or where no time is specified within thirty
9 days prior to trial, notify the attorney for the Government
10 and the court in writing. Whenever a defendant learns of
11 additional classified information he reasonably expects to dis-
12 close at any such proceeding, he shall notify the attorney for
13 the Government and the court in writing as soon as possible
14 thereafter. Such notice shall include a brief description of the
15 classified information. No defendant shall disclose any infor-
16 mation known or believed to be classified in connection with
17 a trial or pretrial proceeding until notice has been given
18 under this subsection and until the Government has been af-
19 forded a reasonable opportunity to seek a determination pur-
20 suant to the procedure set forth in section 6 of this Act.

21 (b) FAILURE TO COMPLY.—If the defendant fails to
22 comply with the requirements of subsection (a), the court
23 may preclude disclosure of any classified information not
24 made the subject of notification and may prohibit the exami-

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1 nation by the defendant of any witness with respect to any
2 such information.

3 IN CAMERA PROCEDURE FOR CASES INVOLVING
4 CLASSIFIED INFORMATION

5 SEC. 6. (a) MOTION FOR IN CAMERA PROCEEDING.—

6 Within the time specified by the court for the filing of a
7 motion under this section, the Government may move for an
8 in camera proceeding concerning the use at trial or any pre-
9 trial proceeding of any classified information. Thereafter,
10 either prior to or during trial, the court for good cause shown
11 may grant the Government leave to move for an in camera
12 proceeding concerning the use of additional classified infor-
13 mation.

14 (b) DEMONSTRATION OF NATIONAL SECURITY
15 NATURE OF THE INFORMATION.—In order to obtain an in
16 camera proceeding, the Government shall submit the classi-
17 fied information to the court for its examination in camera
18 and shall demonstrate in an ex parte proceeding that the dis-
19 closure of the information reasonably could be expected to
20 cause damage to the national security in the degree required
21 to warrant classification under the applicable Executive
22 order, statute, or regulation.

23 (c) IN CAMERA PROCEEDING.—(1) Upon finding that
24 the Government has met the standard set forth in subsection
25 (b) with respect to some or all of the classified information

1 submitted to the court, the court shall conduct an in camera
2 proceeding. Prior to the in camera proceeding, the Govern-
3 ment shall provide the defendant with notice of the informa-
4 tion that will be at issue. This notice shall identify the specif-
5 ic classified information that will be at issue whenever that
6 information has previously been made available to the de-
7 fendant in connection with pretrial proceedings. The Govern-
8 ment may describe the information by generic category, in
9 such form as the court may approve, rather than identifying
10 the specific information of concern to the Government when
11 the Government has not previously made the information
12 available to the defendant in connection with pretrial pro-
13 ceedings. Following briefing and argument by the parties to
14 the court in camera, the court shall determine whether the
15 information may be disclosed at the pretrial or trial proceed-
16 ing. Where the Government's motion under subsection (a) is
17 filed prior to the trial or pretrial proceedings, the court shall
18 rule prior the commencement of the relevant proceeding.

19 (2) Unless the court makes a specific, written determi-
20 nation that the information is relevant and material to an
21 element of the offense or a legally cognizable defense and is
22 otherwise admissible in evidence, the information may not be
23 disclosed or elicited at a pretrial or trial proceeding and the
24 record of the in camera proceeding shall be sealed and pre-
25 served by the Government in the event of an appeal. The

1 defendant may seek reconsideration of the court's determina-
2 tion prior to or during trial.

3 (3) If the court makes a determination under subsection
4 (c)(2) that would permit disclosure of the information or if the
5 Government elects not to contest the relevance, materiality,
6 and admissibility of the classified information, the Govern-
7 ment may proffer a statement admitting for purposes of the
8 proceeding any relevant facts such information would tend to
9 prove or may submit a portion or summary to be used in lieu
10 of the information. The court shall order that such statement,
11 portion, or summary be used by the defendant in place of the
12 classified information unless it finds that use of the classified
13 information itself is necessary to afford the defendant a fair
14 trial.

15 (4) If the court determines that these alternatives to full
16 disclosure may not be used and the Government continues to
17 object to disclosure of the information, the court shall issue
18 any order which the interests of justice require. Such an
19 order may include, but need not be limited to an order—

20 (i) striking or precluding all or part of the testimo-
21 ny of a witness; or

22 (ii) declaring a mistrial; or

23 (iii) finding against the Government on any issue
24 as to which the evidence is relevant and material to
25 the defense; or

1 (iv) dismissing the action, with or without preju-
2 dice; or

3 (v) dismissing specified counts of the indictment
4 against the defendant.

5 Any such order shall permit the Government to avoid the
6 sanction for nondisclosure by agreeing to permit the defend-
7 ant to disclose the information at the pertinent trial or pre-
8 trial proceeding. The Government may exercise its right to
9 take an interlocutory appeal prior to determining whether to
10 permit disclosure of any classified information.

11 INTERLOCUTORY APPEAL

12 SEC. 7. (a) An interlocutory appeal by the United States
13 taken before or after the defendant has been placed in jeop-
14 ardy shall lie to a court of appeals from a decision or order of
15 a district court in a criminal case requiring the disclosure of
16 classified information, imposing sanctions for nondisclosure of
17 classified information, or refusing a protective order sought
18 by the United States to prevent the disclosure of classified
19 information, if the Attorney General, Deputy Attorney Gen-
20 eral, or designated Assistant Attorney General certifies to
21 the district court that the appeal is not taken for purposes of
22 delay.

23 (b) An appeal taken pursuant to this section either
24 before or during trial shall be expedited by the court of ap-
25 peals. Prior to trial, an appeal shall be taken within ten days

1 after the decision or order appealed from and the trial or
2 relevant pretrial proceeding shall not commence until the
3 appeal is resolved. If an appeal is taken during trial, the trial
4 court shall adjourn the trial until the appeal is resolved and
5 the court of appeals (i) shall hear argument on such appeal
6 within four days of the adjournment of the trial, (ii) may dis-
7 pense with written briefs other than the supporting materials
8 previously submitted to the trial court, (iii) shall render its
9 decision within four days of argument on appeal, and (iv) may
10 dispense with the issuance of a written opinion in rendering
11 its decision. Such appeal and decision shall not affect the
12 right of the defendant, in a subsequent appeal from a judg-
13 ment of conviction, to claim as error reversal by the trial
14 court on remand of a ruling appealed from during trial.

15 INTRODUCTION OF CLASSIFIED INFORMATION

16 SEC. 8. (a) CLASSIFICATION STATUS.—Writings, re-
17 cordings, and photographs containing classified information
18 may be admitted into evidence without change in their classi-
19 fication status.

20 (b) PRECAUTIONS BY COURT.—The court, in order to
21 prevent unnecessary disclosure of classified information in-
22 volved in any criminal proceeding, may order admission into
23 evidence of only part of a writing, recording, or photograph,
24 or may order admission into evidence of the whole writing,

1 recording, or photograph with excision of some or all of the
2 classified information contained therein.

3 (c) CONTENTS OF WRITING, RECORDING OR PHOTO-
4 GRAPH.—The court may permit proof of the contents of a
5 writing, recording, or photograph that contains classified in-
6 formation without requiring introduction into evidence of the
7 original or a duplicate.

8 (d) TAKING OF TESTIMONY.—During the examination
9 of a witness in any criminal proceeding, the Government may
10 object to any question or line of inquiry that may require the
11 witness to disclose classified information not previously found
12 to be relevant and material to the defense. Following such an
13 objection, the court shall take such suitable action to deter-
14 mine whether the response is admissible as will safeguard
15 against the compromise of any classified information. Such
16 action may include requiring the Government to provide the
17 court with a proffer of the witness' response to the question
18 or line of inquiry and requiring the defendant to provide the
19 court with a proffer of the nature of the information he seeks
20 to elicit.

21 SECURITY PROCEDURES TO SAFEGUARD AGAINST COM-
22 PROMISE OF CLASSIFIED INFORMATION DISCLOSED
23 TO THE COURT

24 SEC. 9. (a) Within one hundred twenty days of the date
25 of enactment of this Act, the Chief Justice of the United

1 States, in consultation with the Attorney General, the Direc-
2 tor of Central Intelligence, and the Secretary of Defense,
3 shall prescribe security procedures for protection against the
4 compromise of classified information submitted to the Federal
5 district courts, the courts of appeals, and the Supreme Court.

6 (b) Until such time as procedures are promulgated pur-
7 suant to subsection (a), the Federal courts shall in each case
8 involving classified information adopt procedures to protect
9 against the compromise of such information. Such procedures
10 may include, but need not be limited to, those set forth in
11 section 4(a) of this Act.

12 JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION

13 SEC. 10. (a) Section 3500 of title 18, United States
14 Code, is amended by adding after subsection (c) the following
15 new subsection:

16 "(d) If the United States claims that any statement or-
17 dered to be produced under this section contains classified
18 information, the United States may deliver such statement
19 for the inspection of the court in camera and provide the
20 court with an affidavit identifying the portions of the state-
21 ment that are classified and the basis for the classification
22 assigned. If the court finds (1) that disclosure of any portion
23 of the statement identified by the Government as classified
24 could reasonably be expected to cause damage to the national
25 security in the degree required to warrant classification under

1 the applicable Executive order, statute, or regulation, and (2)
2 that such portion of the statement is consistent with the wit-
3 ness' testimony, the court shall excise the portion from the
4 statement. With such material excised, the court shall then
5 direct delivery of such statement to the defendant for his use.
6 If, pursuant to such procedure, any portion of such statement
7 is withheld from the defendant and the defendant objects to
8 such withholding, and the trial is continued to an adjudication
9 of the guilt of the defendant, the entire text of such statement
10 as well as the affidavit submitted by the United States shall
11 be preserved by the United States and, in the event the de-
12 fendant appeals, shall be made available to the court of ap-
13 peals for its examination for the purpose of determining the
14 correctness of the ruling of the trial judge. Whenever any
15 statement is delivered to a defendant pursuant to this section,
16 the court in its discretion, upon application of said defendant,
17 may recess proceedings in the trial for such time as it may
18 determine to be reasonably required for the examination of
19 such statement by said defendant and his preparation for its
20 use in the trial."

21 (b) Chapter 223 of title 18, United States Code, is
22 amended as follows:

23 (1) Present subsections 3500(d) and 3500(e) are
24 redesignated subsections 3500(e) and 3500(f),
25 respectively.

14

1 (2) In new subsection 3500(e), following the word
2 “under” replace “subsection (b) or (c)” with “subsec-
3 tion (b), (c), or (d)”.

4 (3) In new subsection 3500(f), following the words
5 “used in” replace “subsection (b), (c), and (d)” with
6 “subsection (b), (c), (d), and (e)”.

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